IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1604

GLENDA KANTOR,
Petitioner,

vs.

WINFIELD DUNN, et al.,
Respondents.

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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### OPINION AND ORDER BELOW

The unreported order of the United States Court of Appeals for the Sixth Circuit which was filed on February 7, 1978 and which affirmed the decision of the United States District Court for the Western District of Tennessee is fully set forth in Appendix A to the Petition in this case. The memorandum opinion of the United States District Court for the Western District of Tennessee is also fully set forth in Appendix B to the Petition.

## JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

## QUESTION PRESENTED

The respondents are dissatisfied with the presentation of the questions by petitioner; therefore, pursuant to Rule 40(3) of the Supreme Court Rules, respondents present the question as follows:

1. **Was the Court of Appeals Correct in Concluding That the Findings of the District Court Were Not Clearly Erroneous in That the District Court Found That Under the Facts Established, a Minimal Burden Was Placed Upon Petitioner by the State's Policy of Administering Examinations for Employment in the City of Petitioner's Residence Exclusively on Saturdays, While Offering the Same Examinations in Another City on Any Weekday and That the State Established a Substantial Administrative and Financial Reason for Its Policy?**

## STATEMENT OF THE CASE

The petitioner omits certain facts from petitioner's statement of the case which respondents believe are material to respondents' position. In order to correct these omissions, respondents set forth the following supplemental facts. Reference to the appendix or record of this cause as they appeared before the United States Court of Appeals for the Sixth Circuit will be designated by the abbreviations A.— or R.—, respectively.

The State of Tennessee tests approximately thirty thousand (30,000) applicants for state employment each year. (R. 51).



The Tennessee Department of Personnel, which administers examinations for state employment, is a centrally located department with its offices located exclusively in Nashville, Tennessee. (A. 44). Examinations for state employment are given in eight Tennessee cities. (A. 44). These examinations are offered in Nashville, Tennessee, on Monday through Friday of each week and exclusively on Saturdays in all other cities due to the fact that facilities are not available to administer the examination through the week in cities other than Nashville. (A. 45). The one exception to the Saturday-only testing policy in cities other than Nashville is in conjunction with manual, clerical skills examinations which are administered by local offices of the Tennessee Department of Employment Security for the Tennessee Department of Personnel (A. 47).

The determination of the date, time and location of examinations is a policy determination made by the Commissioner of Personnel pursuant to statutory authority. (A. 49 and R. 60). There are several factors upon which the Department of Personnel's policy of testing only on Saturdays in cities other than Nashville is based, including the following: the availability of physical facilities and staff for administering the examinations, (A. 48); the availability of applicants to take the examination, (R. 61 and A. 59); the fact that state employees of departments other than the Department of Personnel could not administer the examinations (A. 51); security for the examinations, (R. 81); and lack of funding to establish daily testing centers in cities other than Nashville, (A. 45, 50 and R. 81). The State has refused to schedule individual tests on days other than Saturday in cities other than Nashville due to the fact that the State would have to follow the same policy in regard to all applicants at all testing centers. (R. 71)

The United States Court of Appeals for the Sixth Circuit filed an order on February 7, 1978 which affirmed the judgment of the District Court in favor of the respondents, de-

fendants below. The basis of the Court of Appeals' order was as follows:

> "The district court found that the burden placed upon appellant was, under the facts established, minimal, and that the State established a substantial administrative and financial reason for employing its general policy, and concluded that her right to freely exercise her relion had not been unconstitutionally infringed, and it is here concluded that these findings are not clearly erroneous." (App. A to Petition, pp. 15-16).



## BRIEF AND ARGUMENT

Respondents take issue with the four (4) reasons assigned by petitioner as justification for this Honorable Court to issue the writ of certiorari, and respondents respectfully submit that the Petition for Writ of Certiorari should be denied.

### 1. No Question of an Employer's Accommodation to an Employee's Sabbath Observance Is Presented in This Case.

Petitioner indicates in points 1 and 2 of the reasons for granting certiorari (Petition, pp. 10 and 11) that a question is presented in this case as to the extent that an employer is required to accommodate an employee's right of Sabbath observance. Respondents respectfully submit that this question is simply not presented by this case.

The undisputed facts in this case are that petitioner was an applicant for employment with the State of Tennessee, as opposed to an employee of the State. Petition pp. 7 and 8. This case does not, therefore, present any question relative to the extent that an employer is required to accommodate an employee's right of Sabbath observance. The issue decided by the District Court in this case was whether petitioner's constitutional rights were infringed by the State's policy which required petitioner, an applicant, to take an employment examination in Nashville, Tennessee on a weekday when she could not, due to religious beliefs, take the examination on a Saturday in Memphis, Tennessee. App. B to Petition, pp. 17-21.

It should be noted that this case was not instituted under 42 U.S.C. § 2000e, *et seq.* but rather under 42 U.S.C. § 1983, and the First and Fourteenth Amendments to the United States Constitution. Petition, p. 7. 42 U.S.C. § 2000e(j) requires that an employer "reasonably accommodate . . . an employee's or prospective employee's religious observance . . ." unless such

accommodation would cause the employer "undue hardship". The "reasonable accommodation" test is, of course, a statutory standard for determining an employer's compliance with 42 U.S.C. § 2000e, *et seq*. It is not a standard for reviewing the constitutionality of an act or policy; it has not been asserted heretofore as an issue in this case; and it is clear that this case presents no question as to an employer's duty to accommodate or reasonably accommodate an employee's or prospective employee's religious observance.

2. **There Is No Conflict in the Decisions of This Court Relative to the Test for Determining Whether a Law Is Constitutional Under the Free Exercise Clause of the First Amendment.**

Citing *Trans World Airlines, Inc. v. Hardison*, — U.S. —, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977); *West Virginia State Board of Education v. Barnett*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943); *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), petitioner asserts that there is a conflict between the *Trans World Airlines* case and the three (3) other cases relative to the test for determining whether a law is constitutional under the Free Exercise Clause of the First Amendment to the United States Constitution. Petition, p. 10.

This Court's decision in *Trans World Airlines, Inc. v. Hardison, supra*, did not involve a determination of the constitutionality of any statute, policy, or practice. In the Court's words, the sole issue in *Trans World Airlines, supra*, was ". . . the extent of the employer's obligation under Title VII to accommodate an employee whose religious beliefs prohibit him from working on Saturdays." 53 L.Ed.2d at 120. It is, therefore, rather clear that *Trans World Airlines, Inc. v. Hardison, supra*, has no application to the case at bar because, as noted



above, the case at bar presents no question under 42 U.S.C. §2000e, *et seq*.

While respondents do not concede that this Court's decisions in *West Virginia State Board of Education v. Barnett, supra*, *Sherbert v. Verner, supra*, and *Wisconsin v. Yoder, supra*, are applicable to the case at bar, respondents do contend that there is no conflict between these decisions and the Court's decision in *Trans World Airlines, Inc. v. Hardison, supra*.

3. **The District Court, as Affirmed by the Court of Appeals, Correctly Found That Petitioner's Right to Freely Exercise Her Religion Had Not Been Unconstitutionally Infringed and the Findings of Fact of the District Court Have Not Been Shown to Be Clearly Erroneous.**

The respondents take the position that the respondents' offer to administer an employment examination to petitioner in Memphis, Tennessee on a Saturday or, in the alternative, in Nashville, Tennessee on a weekday did not impose any burden on the free exercise of petitioner's religion. Although the District Court found that the State's policy did place a burden on petitioner's free exercise of her religion, the Court concluded that petitioner's right to freely exercise her religion had not been unconstitutionally infringed. App. B to Petition, p. 21. The respondents, therefore, concur with the result reached by the District Court and with the order of the Court of Appeals affirming the District Court's decision.

As the District Court noted in its memorandum opinion (App. B to Petition, pp. 19 and 20), the case at bar is not analogous to *Wisconsin v. Yoder, supra*, and *West Virginia State Board of Education v. Barnett, supra*.

In *West Virginia State Board of Education v. Barnett, supra*, this Court held that school children could not be required by the threat of expulsion from school to salute the United

States flag in violation of their religious beliefs. In *Wisconsin v. Yoder, supra*, the Court held that the state could not enforce its compulsory school attendance laws to require Amish children to attend school beyond the eighth grade in violation of their religious beliefs. In both of these cases the states sought to compel some action on the part of religious observants which violated their religious beliefs. These cases are substantially different from the case at bar where petitioner was not compelled to act in violation of her religious beliefs.

The respondents respectfully contend that petitioner's First Amendment rights were not violated under the facts of this case because the State did not compel petitioner to do any act which would violate her religious beliefs. The respondents did not compel petitioner to take the State's examination in Memphis on a Saturday or forfeit her opportunity for state employment. The respondents offered petitioner a viable and reasonable alternative and that alternative was to take the examination on any weekday in Nashville, Tennessee.

In view of the alternative available to petitioner, respondents also contend that the case *sub judice* is not like the case of *Sherbert v. Verner, supra*. In *Sherbert v. Verner* this Court held that it was a denial of First Amendment rights for a state to withhold unemployment compensation from a Seventh day Adventist because she refused to accept employment on Saturday, her Sabbath. The state action in *Sherbert, supra*, gave the appellant no alternative in that she, by the state's action, was either compelled to work on Saturday, which violated her religious beliefs, or forfeit her unemployment compensation benefits. Herein lies the difference in the *Sherbert* case and the case at bar where petitioner had available the opportunity to take the state's employment examination on a day other than Saturday in another city.

In reaching its conclusion that petitioner's right to freely exercise her religion had not been unconstitutionally infringed,



the District Court applied this Court's decisions in *Braunfeld v. Brown*, 366 U.S. 599, 81 S.Ct. 1144, 1 L.Ed.2d 566 (1961) and *Sherbert v. Verner, supra*. App. B to Petition, p. 21. In applying these decisions and in concluding that petitioner's rights had not been unconstitutionally infringed, the District Court made the following findings of fact:

> "In the view of this court, the burden placed upon Ms. Kantor was, under the facts presented here, minimal. On the other hand, the state did show a substantial administrative and financial reason for employing its general policy." App. B to Petition, p. 21.

Respondents respectfully submit that these findings of the District Court are correct and that there has been no showing by petitioner that these findings are clearly erroneous.

Rule 52(a) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> ". . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses . . ."

The finding of the District Court, as affirmed by the Court of Appeals, was not ". . . that the burden of paying $15.00 plus postal charges was a great enough burden to restrict her [petitioner's] Sabbath observance . . ." Petition, p. 11. Contrary to this contention, the finding of the District Court that the respondents had shown a substantial administrative and financial reason for its policy was based upon other factual findings of the Court. See App. B to Petition, pp. 18 and 19.

The factual findings of the District Court are undisputed, and respondents respectfully submit, therefore, that there has been no showing that these findings are clearly erroneous.

## CONCLUSION

As the petition presents no question which merits this Honorable Court's review upon a writ of certiorari, the respondents respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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